TWO BURDENS OF PROOF.

PROFESSOR THAYER'S recent article on the Burden of Proof, in which he has so lucidly traced the history of an embarrassing ambiguity in the phrase, and explained the considerations bearing on its proper use, invites further suggestion as to the essential nature of the burden. The subject is of great importance, both in procedure and in its relation to substantive law,— to procedure, because probably more verdicts are lost by misapprehension on this subject than by any other cause; and to substantive law, because it is through the burden of proof and its converse, the doctrine of presumptions, that a considerable part of substantive law gets into recognized existence.

Professor Thayer has delineated the two uses of the phrase "Burden of Proof." In jury cases there are in fact two different burdens of proof, or two different standards of the burden,— two different scales in which the burden is to be weighed. We might apply the metaphor more literally, and say two different arbiters by whom the question whether counsel has carried the burden of his case is to be determined; but then we must add that the law prescribes different tests to be applied by these different arbiters. In other words, the two senses in which the phrase is used correspond to the twofold character of the tribunal. To simplify the question, I will confine what I have to say to civil causes.

In a number of cases the judges (using general language though speaking in view of a particular case before them) have said that the burden is always on the plaintiff throughout. It ought to be observed, however, that the burden of proof is on the plaintiff only when he has invited the issue. If the only issue to be tried is one which the defendant has invited, the burden of proof is on the defendant. Thus, if the only defence is a denial, the burden of proof is on the plaintiff. If there is no denial, but an admission, express or implied, of the plaintiff's allegations, and the defence is an affirmative statement of new matter in excuse or discharge, the burden of proof is on the defendant. Let us suppose, for instance, that where there is no denial the defence consists simply of a release or an accord and satisfaction, or payment. In such case (under those systems of pleading where a failure to deny is an

admission) there is no burden on the plaintiff; and it is error to charge the jury that it is on him. The burden is on the defendant to establish his affirmative defence. This shows that there is no invariable rule that the plaintiff has the burden of proof. The burden usually is said to be on him only because he usually has the burden of the issue; and the cases which declare that the burden throughout remains on the plaintiff mean no more than that, and are consistent with saying that when the only issue is invited by the defendant, the burden of proof, by the same principle, remains throughout upon the defendant. If both kinds of issues are raised by the pleadings, the burden is on each party as to his own allegation.

Having premised this, let us take a case where the defence is a mere denial, and therefore the burden of the issue is on the plaintiff. In such a case, if the plaintiff gives no evidence his action is dismissed. If he gives evidence, the question at its close is whether that evidence is enough to support a verdict, whichever way the verdict may be; in other words, does the evidence present a question on which fair-minded men may reasonably differ. This is a question of law. If the evidence is in that condition, the plaintiff has a right to go to the jury on the question of fact; but the question whether it is in that condition does not go to the jury: the judge has to decide that before submitting the cause to the jury. If the cause is submitted to them, the question for them will be whether the plaintiff has shown sufficient to satisfy them of his right to a verdict in his own favor and against the defendant. The judge cannot decide this question. The judge weighs the proof for one purpose, and the jury for another. The judge weighs it to see that there might be a verdict either way; the jury weigh it to see which way it ought to be. If the judge sees there might be a verdict either way he submits the case to the jury, telling them that the burden of proof on the question, Which way? is on the plaintiff.

But again, before the case goes to the jury the defendant has a right to offer evidence under his denial; and after that evidence, if the judge finds that fair minds might reasonably differ, the question will go to the jury (as in the former case), with the burden of proof, usually, resting on the plaintiff. To make the distinction more clear we may call this the burden of satisfying the jury.

Let us now suppose that the plaintiff, having the burden of the issue, instead of closing with evidence merely sufficient to go to

the jury, goes on and gives sufficient, if uncontradicted, to require the judge to direct a verdict. He has now successfully carried what we may call the burden of proving to the judge, or the burden of satisfying the law. If the defendant gives no evidence the plaintiff's right is clear, and it will be error to leave the cause to the jury, even were it accompanied with an instruction that the burden of proof is on the defendant.

It is obvious, then, that proof for the judge, to make it his duty to decide the cause by directing a verdict, requires a different quantity of evidence, and therefore makes a different burden from proof for the jury. Proof for the jury requires merely a preponderance of evidence; proof for the judge requires something more: for the present purpose we may say it requires enough to dictate a legal conclusion.

To use a homely illustration, a civil jury trial may be compared to a game of shuffle-board. To adapt the illustration to the purpose, let us suppose the square divided into three fields. The first and nearest to the player is the field of mere scintillas: if the plaintiff's evidence halts there, he is lost. The next, or middle, field is that of balancing probabilities: if his evidence reaches and rests there, he gets to the jury; but they alone can decide the cause, and they may decide it either way, or may disagree. The third and last field is that of legal conclusion: if his evidence can be pushed into that division, he is entitled to his victory at the hands of the judge, and the jury cannot draw it into doubt; but before the judge can do so, the defendant has a right to give evidence, and that evidence may bring the plaintiff's evidence back into doubt again, and leave the case in the field of balancing probabilities.

Every practising attorney knows the successive stages of hope and of effort that he passes through in the trial of a doubtful and keenly contested cause, in which he gathers strength on the evidence as it is put in. At the opening he is not sure that he will be able to present evidence enough to go to the jury, and he bends every effort, and even takes some risks by accepting doubtful rulings, and gives the defendant some dangerous exceptions in order to get in enough evidence to entitle him to go to the jury. As his evidence accumulates, his confidence and his spirits rise, for now he hopes to get beyond the jury line, and make a case of proof for the judge, on which the judge may refuse to submit any question to the jury, and himself direct a verdict. Similarly the defendant, in his

turn, after a *prima facie* case has been made by the plaintiff, may at first hope for nothing more than to prevent the judge from directing a verdict, by adducing evidence strong enough to require submission to the jury; and in this he may even expect nothing more than a disagreement; but after he has progressed in this far enough to be confident that he has taken the cause from the judge, he begins, as his evidence accumulates, to hope to satisfy the jury; and now for the first time he says he is "going for the verdict;" and it may be in turn his fortune to feel that his evidence has carried him beyond the jury and entitled him to a direction of a verdict in his favor.

It thus becomes clear that there are two measures of proof, — one, the less, sufficient to submit to the jury; the other, the greater, sufficient to control the judge. The burden of satisfying the latter is heavier than the burden of satisfying the former.

This brings us to the question, Does either burden ever shift, and if so, which; or should we say that there is an alternation from one burden to the other?

Let us take the case of a plaintiff whose evidence raises a presumption of law in his favor. He has carried his burden, and "the burden of going forward with the case" now devolves upon the defendant. The defendant has the same alternative before him which the plaintiff had. He may give such overwhelming evidence against the plaintiff's case as to require the judge (unless the plaintiff reinforces his case by further evidence) to direct a nonsuit or a verdict, or he may give only sufficient evidence to bring the plaintiff's case into doubt, and thus leave the cause with the jury. It appears thus that the burden which the defendant takes up, although of the same nature as that which the plaintiff took up in the first instance, does not necessarily require the same measure of proof as was furnished by the plaintiff. The plaintiff took up the burden of proving either to the judge or to the jury. But it was because the plaintiff succeeded in proving to the judge that the defendant had in turn the burden of proving something; and he has the same alternative of proving to the satisfaction of either.

It is when the evidence of both parties is in, and the case is to be given to the jury, that the question of proving to the jury is raised by itself alone.

Again, the two senses of burden of proof have some analogy to the two classes of presumptions, — presumptions of law and presumptions of fact.

To make the jury the arbiter of whether the burden of proof is successfully carried, the cause must, at its close, involve some question of fact. If the evidence is presumptive, then, in order to have that effect, an essential part of it at least must be a presumption of fact. If no essential part of presumptive evidence is a presumption of fact, then it follows that a presumption of law is involved, and a presumption of law, if unrebutted, is sufficient to determine the cause; and this is a question for the judge, and cannot go to the jury. To make the application of this more clear, let us call the presumptions of fact, inferences or permissible presumptions; that is to say, presumptions which *may be made or not*, according to the opinion of the jury, as distinguished from legal presumptions which *must* be made, and must be made *by the judge* if asked. Considered with reference to their effect on the trial, presumptions may be thus described. A conclusive presumption binds the party, the judge, and the jury. A rebuttable legal presumption binds only the judge and the jury. A presumption of fact, or, as I will call it, a permissible presumption or an inference, is only for the jury. But neither a conclusive nor a rebuttable presumption binds if the minor premise is rebutted. A conclusive presumption is one which can only be met by rebutting the minor premise. A rebuttable presumption is one that may be met either by rebutting the minor premise, or by rebutting the conclusion with or without attempting to rebut the minor premise. A presumption of fact may be met by rebutting either the major premise or the minor premise, or the conclusion, indifferently; and to rebut either is enough. Thus, in those jurisdictions where a seal is held conclusive evidence of consideration, if the plaintiff gives in evidence an obligation with a seal, the defendant can only repel the conclusion of consideration by rebutting the evidence of the validity of the sealed instrument; that is to say, the legal existence of a seal of the defendant. But if a statute exists, as in some jurisdictions declaring a seal only presumptive evidence of consideration, the presumption is thereby made rebuttable, and the defendant may now concede the seal, and yet rebut the conclusion by direct evidence that in fact there was no consideration, seal to the contrary notwithstanding. If under either state of the law the plaintiff by proving the seal raises a legal presumption of consideration, he thereby makes (if that be the only question in the cause) a case on which, in the absence of evidence on the defendant's part, the judge must direct a verdict. Now, if the defendant meets the pre-

sumption, whether conclusive or rebuttable, by evidence attacking the minor premise, — namely, by contradicting the evidence that the instrument was the defendant's bond, — he is entitled to go to the jury; and the jury must be instructed that the burden is on the plaintiff to prove to their satisfaction, by a preponderance of probability, that it was the defendant's bond. If they find that it was, the conclusion is inevitable, that there was a consideration: in the first case (*i. e.*, the case of a conclusive presumption), because the defendant cannot deny the conclusion; in the second case (*i. e.*, in the case of a rebuttable presumption), because by the supposition he has only sought to disprove the making of the bond, and has given no evidence that, conceding the seal, there was no consideration in fact In the absence of such evidence the seal is sufficient as matter of law. Hence, if the evidence of the defendant has controverted the premise, the burden is on the plaintiff to establish the premise; for, without that premise, he has no right to invoke the presumption.

In case, however, the presumption is only rebuttable, the defendant may, without attacking the premise, attack the conclusion by direct evidence; and where he does so, since he thus has conceded the premise, there is an acknowledged legal presumption against him, unless he succeeds in satisfying the jury that the conclusion ought not, in this case, to follow.

This brings us to the point on which the authorities, as to burden of proof for the jury, are in conflict. Some cases are in accord with the principle that if the premise is established by uncontroverted and unimpeached evidence, and the opposing evidence only controverts the conclusion, the jury may be told that the burden is shifted to the defendant to overcome the presumption. Other cases require us to recognize a contrary principle; viz., that if the defendant, even while tacitly conceding the premise of a legal presumption against him, gives evidence controverting the conclusion, the whole matter is set at large, and the jury must be instructed that the burden is on the plaintiff throughout.

So far, therefore, as the principles of logic are alone a safe guide, we find the following rules. At the outset the plaintiff has the burden of proving his case, — to the judge as matter of law, or to the jury as matter of fact. If he does not satisfy the judge as matter of law, the cause goes to the jury, with the instruction that the burden is on the plaintiff throughout to satisfy the jury.

If he does satisfy the judge in the first instance, it is proper for

the judge to say, as a guide to himself, that the burden of proof has shifted to the defendant, and if the defendant give no evidence, he must decide for the plaintiff; but it is not proper for him to say so to the jury, unless the cause goes to the jury; and by the supposition it cannot go to the jury unless the defendant gives evidence. If then the defendant does give evidence, the question whether the judge may, in submitting the cause to them, say the burden is on the defendant, depends on what the defendant's evidence is. If the plaintiff relies on presumptive evidence, and the defendant carries the cause to the jury by throwing doubt on the premise on which the plaintiff relies, the burden of proving to the jury rests on the plaintiff throughout. If the defendant carries it to the jury by throwing doubt on the conclusion without attacking the premise, logical principles would suggest that the burden of proving to the jury rests on the defendant, and that in such a case it would be proper to give the jury a binding instruction as to the premise, and tell them that the burden of proof as to the conclusion had shifted to the defendant. The essential cause of the shifting was the plaintiff's having established a rebuttable presumption, the premise of which the defendant has not questioned.

If we examine the principal cases on the question of saying to the jury that this burden has shifted, to see whether these principles are in effect to be found in actual operation, we shall find no little confusion. Some favor the view that if a rebuttable presumption is attacked by opposing the conclusion only, without questioning the premise, the burden still remains on the plaintiff. Upon this view a rebuttable presumption of law sinks into a mere presumption of fact if the conclusion is contradicted by evidence, even though the premise be uncontradicted. Other cases can be clearly explained and fully justified if it be sound to hold that, if the defendant seeks to overthrow a legal presumption by contradicting the conclusion without contradicting the premise, the jury may properly be told that unless the preponderance of probability as to the conclusion is in the defendant's favor, the jury should give effect to any presumption drawn by the law from uncontradicted and unimpeached testimony.

I note below a few familiar cases in a way to illustrate the logical question in respect to the effect of a legal presumption. It will doubtless be found that whatever principle we apply, there will be some incompatibility in the cases.

The main point, which it is my object to make clear, is that

the old maxim, that questions of fact are for the jury, not for the judge, is no longer true; and that to bring a question of fact within the arbitrament of the judge, so that he can say the burden has shifted for the purpose of guiding his decision, requires a different measure of proof from that necessary to give the question to the jury, and allow him to tell them that the burden has shifted, for the purpose of guiding their decision; that in the former, as in the latter case, it is, strictly speaking, a burden of proof, not merely a burden of going forward with the evidence; and there are, therefore, two burdens of proof, of different weight and for different purposes.

AUSTIN ABBOTT.

Powers *v.* Russell, 13 Pick. 69.— Bill in equity to redeem. The plaintiff sought by secondary evidence to prove a deed sworn to have been lost at the time of trial. He relied on evidence that it was attested by witnesses and acknowledged, and produced a copy, but gave no other evidence of delivery. The defendant relied on evidence that the deed remained in possession of the grantor, and that the grantee was not present at its execution. This evidence was submitted to the court subject to exception as to its competency.

For the plaintiff it was argued that he had made out a *prima facie* case, and therefore the burden was on the defendant to show non-delivery. *Held,* not so; but the burden remained on the plaintiff through the whole inquiry. Shaw, C. J., said: "Where the party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such *prima facie* case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still, the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate.

"But where the party having the burden of proof gives competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact.

"To illustrate this: *prima facie* evidence is given of the execution and delivery of a deed; contrary evidence is given on the other side tending to negative such fact of delivery; this latter is met by other evidence; and so on through a long inquiry. The burden of proof has not

shifted, though the weight of evidence may have shifted frequently, but it rests on the party who originally took it. But if the adverse party offers proof, not directly to negative the fact of delivery, but to show that the deed was delivered as an escrow, this admits the truth of the former proposition, and proposes to obviate the effect of it by showing another fact, namely, that it was delivered as an escrow. Here the burden of proof is on the latter." [1]

Burnham *v.* Allen, 1 Gray, 496.— In this case it seems to be clearly held that although the burden is on the defendant (and the jury may be so instructed) to establish an affirmative defence set up, the plaintiff does not, by producing a promissory note expressed to be for value received, throw the burden on the defendant of giving sufficient evidence to rebut the presumption of law that there was a consideration. The opinion, by Chief Justice Shaw, holds that the note raises a presumption of consideration, but appears to leave the burden on the plaintiff to satisfy the jury on the whole evidence that there was a consideration, even if the defendant does not attack the note which was the premise of the legal presumption, but only gives other evidence to rebut the conclusion of consideration given, or tending to show its failure. It is to be observed, however, that the distinction is not clearly made, and the language, both of the charge which was approved, and of the paraphrase given by the Chief Justice, is not inconsistent with the rule I have suggested. The court say, "When in the above sentence the learned judge used the phrase, 'unless the defendant introduced evidence,' we understand him to mean, as above stated, that after the production and proof of the signing of the note, and after thus establishing a *prima facie* case, the plaintiff would be entitled to a verdict, unless the defendant could show, from the whole evidence, want or failure of consideration, or leave the proof so doubtful as to enable the jury to say that the plaintiff had not satisfactorily proved a consideration "[2]

[1] This case was before the court sitting as jury as well as in capacity of judges. It therefore agrees with the cases that hold it error, when a question is submitted to a jury, on a conflict of direct evidence, to tell them that the burden has shifted by virtue of the evidence on one side. But it is also entirely consistent with the proposition (which indeed it directly concedes) that if the defendant gives no evidence to rebut a fact supported by the plaintiff's evidence, but relies wholly on another fact consistent therewith, and intended merely to avoid the resulting legal effect, the burden is on the defendant to establish it.

[2] This certainly leaves the burden on the defendant to satisfy the jury of something, either that the fact was as he claimed, or that the fact alleged by the plaintiff was left in doubt. This case has always been understood by the profession as holding that where the defendant merely rebuts the conclusion of a rebuttable presumption, without questioning the premise, he assumes no burden of proof; but the burden remains on the plaintiff; and if the rebutting evidence leaves the conclusion balancing in doubt, the plaintiff cannot prevail.

Central Bridge Co. *v.* Butler, 2 Gray, 130.— Assumpsit for tolls; general issue. The plaintiffs made a *prima facie* case by proving that the defendant crossed the bridge, which raised a presumption that he was within the general rule of liability. The defendant gave evidence of other persons being allowed to cross free to reach the same lands, and he claimed the right to do so under a vote of the plaintiff corporation giving free passage to those lands. The question seems to have been presented by an exception to the admission of this evidence offered by the defendant, and to the refusal to rule on the contrary that the plaintiff's evidence made a *prima facie* case, and threw the burden on the defendant, which the defendant could not meet by proving an exception he had not alleged. *Held*, that although evidence of passing without paying made a *prima facie* case, the exception was proper matter in contradiction, and was not an affirmative defence. The court say, "The defendant did not aver any new and distinct fact, such as payment, accord and satisfaction, or release, but offered evidence to rebut this alleged legal liability. By so doing he did not assume the burden of proof."[1]

Noxon *v.* DeWolf, 10 Gray, 343.— Action of contract: indorsee of notes against maker. The plaintiff relied on the notes, with undated indorsements, as showing that he took in good faith for value before maturity. The defendant relied on indirect evidence that the note remained in the payees' hands till after maturity, and on his equities against the payees. The judge left to the jury the single question of the plaintiffs' taking before maturity, etc.; told them that the presumption from the notes themselves was that they were indorsed at date; that if they were shown to have been in the payees' hands after that date, the presumption continued that they were indorsed before due; "and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff after they were due, or that they still belonged to the payees." *Held*, not error. The court say: "It may be that under the more precisely accurate use of the term 'burden of proof,' as now held by the court, it would have been more correct to say that upon the production by the holder of a negotiable promissory note, indorsed in blank, the legal presumption is that it was indorsed at its date; and it is incumbent on the defendants to overcome that presumption by evidence. This must have been so understood in the present case, as the plaintiff had already produced a note thus indorsed; and the question was upon the effect of the testimony offered to show the fact that it was indorsed after overdue. Upon such a state of the case, it was the duty of the defendants to offer sufficient evidence to

[1] This case also has always been understood as holding that the defendant has no burden of proving anything to the satisfaction of the jury, except as he relies on new matter, not merely controverting the plaintiff's case.

control the legal presumption arising from the indorsement of the note. In this sense the burden was on the defendants."[1]

Morgan *v.* Morse. 13 Gray. 150. — Action of contract for price of goods sold. The auditor to whom the cause was referred, reported for the plaintiff, who put the report before the jury, and rested. The defendant relied on evidence tending to contradict the report. *Held*, not error to instruct the jury "that the burden of proof was on the defendant to overturn or control the reports." Biglow, J., said: "This mode of using the phrase, though somewhat loose and inaccurate, is quite common, and where not improperly applied to a case so as to confuse or mislead the jury, cannot be held to be a misdirection. *Powers* v. *Russell*, 13 Pick. 76; *Delano* v. *Bartlett*, 6 Cush. 368. In this sense it was manifestly used in the present case. The attention of the court was not called to the distinction between that evidence which was sufficient to impeach and overcome a *prima facie* case, and that which was necessary to sustain the issue on the part of the plaintiff. No instruction was asked by the defendant upon this subject. It would have been more correct for the court to have instructed the jury that the report of the auditor in favor of the plaintiff was *prima facie* evidence, and sufficient to entitle him to a verdict, unless it was impeached and controlled by the evidence offered by the defendant. But we see no reason to believe that the instruction given was not properly understood, or that the defendant was in any way aggrieved thereby."[2]

Lamb *v.* Camden & Amboy R. R. Co., 46 N. Y. 271; reversing 2 Daly, 454. — Action against carriers for loss of goods. It appeared that the bill of lading exempted the defendant from liability for fire. The defendant proved loss by fire, but the court ruled that to go to the jury they must also disprove negligence. After they gave evidence for that pur-

[1] In this case, the plaintiff raised a legal presumption on which the court could not have given the case to the jury, had not the defendants given evidence to rebut the presumption. The evidence which they gave raised at best only a presumption of fact. The court therefore should give the question to the jury, and properly instructed them that the legal presumption bound the jury, unless the defendant had controverted it to their satisfaction; and that if the question on the defendant's evidence (as I understand the charge) rested in doubt, they must find for the plaintiff. This tends to support the proposition that where the conflicting evidence on a question submitted to the jury consists of a presumption of law raised by the party having the burden of the issue, met only by a contradiction of the conclusion, or only by evidence sufficient to raise a presumption of fact, the jury may be instructed that the burden is on the defendant to establish his rebuttal of the adversary's legal presumption, and that if he does not do so, the jury are bound by that legal presumption.

[2] Here the plaintiff by the report raised a presumption of law. The opposing evidence given by the defendant raised only a presumption of fact. The court properly instructed the jury that in the absence of evidence contrary to the conclusions of the report, they were bound by the presumption of law in its favor, and that the burden was on the defendant to contradict it.

pose, the court submitted the case to the jury, instructiug them in effect that the burden was on the defendant to show absence of negligence. *Held*, error. The defendant was exonerated as carrier by the contract. Relieved of this responsibility, it was liable only as a bailee for hire, and the bailor in such case must show negligence. Grover, J., added: "It sometimes occurs, in the progress of a trial, that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence which, uncontradicted, proves the fact alleged by him. It has, in such cases, frequently been said that the burden of proof was changed to the other side; but it was never intended thereby that the party bound to prove the fact was relieved from this, and that the other party, to entitle him to a verdict, was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases the party holding the affirmative is still bound to satisfy the jury that the fact was not as alleged by his adversary. In such cases, the party holding the affirmative is still bound to satisfy the jury, affirmatively, of the truth of the fact alleged by him, or he is not entitled to a verdict. In the present case, to entitle the plaintiff to recover, he was bound to prove that the fire which consumed the cotton, resulted from the negligence of the defendant."[1]

Caldwell *v.* N. J. Steamboat Co., 47 N. Y. 282; affirming 56 Barb. 425. — Negligence, for injuring a passenger. The plaintiff's evidence showed a case, which, under the rule as to carriers by steam, raised a legal presumption of negligence. The defendant's evidence (which is indicated in the opinion of the court below) tended, without contradicting the plaintiff's evidence, to contradict the conclusion of negligence, by showing the care of the engineers. *Held*, not error, in the course of charging the jury, to say that "the burden of disproving negligence is on the defendant." The court, per Church, C. J., said: "This was preceded by the remark that 'the fact that the plaintiff was injured by the escape of steam from the boiler raises the presumption that the defendant was negligent.' So that the jury must have understood the remark first quoted as referring to the burden cast upon the defendant by the plaintiff's evidence. In another part of the charge, as to negligence in the management of the boiler on the occasion of the accident, the judge said: 'The defendant must show there was not any negligence, otherwise it failed.' But added: 'The burden of proof relieving itself of the charge of negligence, after proof of the explosion, rests properly and justly

[1] This case, though often cited for the proposition that the burden never shifs, really turned on the sufficiency of the defence to the action, considered as an action against carriers, and the necessity of the plaintiff's proving negligence to sustain his case as an action against an ordinary bailee. There seems to be nothing in the decision inconsistent with the logical analysis of principles, nor with the cases stated below.

upon the defendant, because it must be presumed to have the means within its control of showing how its property was constructed and managed.'

"This conveyed to the jury the correct rule, that the presumption arising from the plaintiff's proof, unless overthrown by the evidence produced by the defendant, must prevail."[1]

Seyboldt *v.* N. Y., Lake Erie, &c. R. R. Co., 95 N. Y. 568. — Negligence in the carriage of a passenger. The plaintiff gave evidence of circumstances of casualty, which under the rule as to carriers by steam raised a legal presumption of negligence, and these circumstances were not contradicted by the defendants' evidence. The defendants proved other circumstances relied on to show due care on their part. *Held*, not error to refuse to charge that the burden was on the plaintiff. Ruger, C. J., said: "When this request was made, the evidence had clearly raised a presumption of negligence against the defendant, and the only question relating thereto which remained for the jury to consider was whether this presumption had been sufficiently negatived by the evidence introduced by the defendant. Under the authorities cited, it would not have been error even if the court had charged that the plaintiff had established a *prima facie* case; and the burden of explaining the cause of the accident then rested upon the defendant."

[1] This ruling is consonant with the logical principles I have above suggested.